Supreme Court, U.S.
FILED

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No. _____

In the

Supreme Court of the United States

October Term, 1997

JOHNSON BROTHERS WHOLESALE LIQUOR CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When an established union representing a historic bargaining unit of employees seeks to represent additional employees from a residual group of unrepresented employees, are the unrepresented employees entitled to their own representation election limited to the unrepresented employees?

LIST OF PARTIES

The parties to the appeal in the U.S. Court of Appeals for the Eighth Circuit, whose judgment Petitioner requests be reviewed, include Petitioner Johnson Brothers Wholesale Liquor Company, Inc., and the National Labor Relations Board.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Johnson Brothers Wholesale Liquor Co., Inc. ("Johnson Brothers") respectfully petitions that a writ of certiorari issue to review the December 19, 1997 decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Court of Appeals decision, dated December 19, 1997, is unreported (Appendix A-7.) The decision and order of the National Labor Relations Board, dated January 17, 1997, is reported at 322 NLRB No. 159 (1997). (A-9.)

JURISDICTION

The Court of Appeals' decision of which review is sought was rendered in an opinion filed December 19, 1997. (A-7.) The Court of Appeals denied a timely petition for rehearing on February 23, 1998. (A-1.) This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This appeal involves the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

STATEMENT OF THE CASE

I. Introduction

This case involves the basic ground rules for elections that are the cornerstone of employee self-determination under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* In the case before the Court, the question presented affects the rights of the 66 previously unrepresented employees who have a right to their own self-determination election, and who appear to have rejected Teamsters representation if the votes of the 22 already represented Teamsters members whom the Board allowed to vote were not counted.

Petitioner Johnson Brothers seeks to set aside an order to bargain with Teamsters Local 792 essentially as to all driver and warehouse employees at Johnson Brothers' St. Paul, Minnesota warehouse and raises one fundamental issue. The issue is whether the Board properly allowed 22 warehouse employees already represented by Teamsters Local 792 to vote in the election giving rise to the bargaining order before the Court, or whether the Board stacked the deck in what should have been a self-determination election confined to the 66 unrepresented warehouse employees who voted in the election. Including both the 22 already represented Teamsters members and the residual unrepresented employees, the outcome of the election was 45-32 in favor of Teamsters representation, with 11 ballots challenged by the Teamsters uncounted.

Whether the 22 Teamsters members who voted were legal voters is an issue of law. Although the Eighth Circuit's one-paragraph *per curiam* opinion refers to this as "a fact-intensive case," Johnson Brothers' appeal of this issue rests simply on critical findings of fact made by the Board itself: (1) that a historical bargaining unit of so-called seniority list employees has existed at Johnson Brothers' St. Paul

warehouse since at least 1979; (2) that Teamsters Local 792 has represented these seniority list employees since at least 1979; and (3) that all other drivers and warehouse employees have not been represented by any union (A-71). Johnson Brothers has at all times recognized Teamsters Local 792 as the representative of the seniority list employees and the Board has *never* contended or found that any "question of representation" exists as to the seniority list employees represented by Teamsters Local 792.

Where no question of representation exists in the historical bargaining unit, applicable case law and the Board's own precedent provides that *unrepresented employees are entitled to a self-determination election of their own.* The 22 Teamsters members were illegal voters whose participation the Board allowed to determine the outcome of the election and govern the fate of the 66 non-Teamster employees.

II. The Facts Material to this Court's Consideration of the Question Presented

Johnson Brothers is a wholesale distributor of liquor products with a facility in St. Paul, Minnesota. For many years prior to 1979, Johnson Brothers has had a collective bargaining relationship with Teamsters Local 792. Local 792 has represented drivers and warehousemen at Johnson Brothers' St. Paul facility for approximately twenty years. Successive three-year collective bargaining agreements between the parties have distinguished between full-time or seniority list drivers and warehousemen and other drivers and warehousemen who have been denominated over successive contracts as part-timers, extras, temporaries or non-seniority list employees.

On March 6, 1996, over one year before the contract was to expire, Teamsters Local 503 filed a petition for election in Case 18-RC-15911. The petition was amended on March 14,

1996. (A-84.) The amended petition asked to represent full-time and regular part-time individual truck owners and part-time casual, and all other unrepresented drivers and warehousemen employed by Johnson Brothers at its St. Paul location. Teamsters Local 792 intervened in the representation case proceeding.

After Local 503 filed its election petition, Johnson Brothers' labor negotiator, Martin Garden, met with Local 792 to express concern over the Local 503 petition. During the meeting he stated that he felt Local 503 was acting as a "stalking horse" for Local 792. He stated his belief that if Local 503 won an election among the non-seniority list warehousemen and drivers, they would be turned over to Local 792. Local 792's representative stated that that would be appropriate.

A representation hearing was held in this case on March 26, 1996. Johnson Brothers sought the dismissal of Local 503's petition. Instead, the Board issued a Decision and Direction of Election, dated April 19, 1996. The Board *sua sponte* invalidated the existing bargaining unit of seniority list employees and held that the existing collective bargaining agreement did not prevent the election. Further, the Board disregarded the unit of non-seniority list drivers and warehousemen set forth in the Local 503 election petition itself. The Board ordered that the election should include not only the non-seniority list employees, but the Local 792 members who were already covered by the existing collective bargaining agreement between Johnson Brothers and Local 792. (A-71.) Johnson Brothers filed a timely request for review of this decision, which was denied by Order of May 16, 1996. (A-53.) As predicted by Garden, Teamsters Local 503 withdrew from the proceeding and did not participate in the election, having served its function as a stalking horse for Local 792.

The election was held pursuant to the Board's direction on May 16, 1996. At the election, Union observers were allowed to challenge the votes of disputed participants. Johnson Brothers' observers attempted to challenge the votes of the 22 seniority list employees. The Board representative conducting the election refused to allow the challenges and allowed the seniority list drivers to vote in such a manner that their votes could not be distinguished from those of other employees. Johnson Brothers filed timely objections to the election on May 23, 1996. (A-48.)

The challenges permitted by the Board agent, primarily those brought by union observers, were sufficient to prevent a clear outcome to the election. Some of the challenged ballot issues were resolved by a Supplemental Decision and Order of June 7, 1996. (A-42.) Teamsters Local 792 was judged to have won the election, although because of unresolved union challenges to voters the real margin of "victory" was apparently only two votes. (Adding the eleven challenged ballots to 32 votes against the union gives a vote count of 45-43). (A-47.) Johnson Brothers' request for review of this decision was denied on July 15, 1996.

The Board declined to investigate Johnson Brothers' objections to the election, and by decision of July 31, 1996, certified Teamsters Local 792 as the representative of employees. (A-34.) Johnson Brothers filed a timely request for review to that decision which was denied by Order of September 24, 1996. (A-16.)

In order to obtain review of the Board's decisions in this matter, Johnson Brothers refused to bargain with Local 792 over the unit certified as a result of the election. Local 792 thereafter filed an unfair labor practice charge on October 23, 1996, alleging Johnson Brothers' refusal to bargain in good faith. The Board issued a complaint on November 4, 1996 and moved for summary judgment. On January 17, 1997, the motion for summary judgment was granted by the Board in

Johnson Brothers Wholesale Liquor Company, 322 NLRB No. 159 (1997). (A-9.) Johnson Brothers' petition to set aside the Board's order and the Board's cross application for enforcement of its order followed.

If the 11 ballots challenged by the Teamsters but not counted by the Board were against union representation, the outcome of the election including the 22 Teamsters members who voted was 45-43 in favor of Teamsters representation. At the least, the outcome of the election was extremely close.

Moreover, it is likely that that 22 seniority list employees represented by the Teamsters voted in favor of Teamsters representation. If the Teamsters were to have lost the election, these employees would in turn have lost the benefit of the extremely favorable contract under which they were working. If their votes had not been counted, *i.e.*, if they had not been allowed to vote, it appears that the Teamsters would decisively have lost the election among the residual unrepresented employees by a vote of 43-23.

In any event, it cannot be disputed that the participation of the 22 seniority list employees represented by the Teamsters could have affected the outcome of the election and the Board has never disputed it. The question whether the 22 seniority list employees who were already represented by the Teamsters should have been allowed to vote -- whether they were legal voters -- is a critical issue of public importance that the Eighth Circuit failed to address expressly and resolved erroneously.

REASONS FOR GRANTING THE WRIT

I. UNREPRESENTED EMPLOYEES ARE ENTITLED TO DETERMINE THEIR OWN STATUS IN A SELF-DETERMINATION ELECTION.

Johnson Brothers has contended at all relevant times that, if there was to be an election, the non-seniority list employees were entitled to their own self-determination election. Under applicable case law and Board precedent, when an established union attempts to add new members from among a fringe group of employees the union does not represent, the Board follows a two-step process. First, after the union files its petition and the Board determines a question of representation exists concerning the fringe group, the Board will determine whether the fringe group and the existing unit together form an appropriate unit. *New Berlin Grading Co. v. NLRB*, 946 F.2d 527, 531 (7th Cir. 1991); *NLRB v. Southern Indiana Gas & Elec. Co.*, 853 F.2d 580, 582 (7th Cir. 1988). The second step of the process is a self-determination election to give the fringe employees their choice, whether they prefer to be represented by the existing unit or whether they prefer to remain unrepresented. *New Berlin Grading Co.*, 946 F.2d at 531; *Southern Indiana Gas & Elec.*, 853 F.2d at 582; *NLRB v. American Printers and Lithographers*, 820 F.2d 878, 880 (7th Cir. 1987; *Duke University*, 227 NLRB 1627 (1977); *Chrysler Corporation*, 173 NLRB 1046 (1968).

Only one exception to this requirement of a separate self-determination election exists, but on the undisputed facts of this case the exception is inapplicable. Indeed, because the inapplicability of this exception belies its argument, the Board simply omits any reference to it.

In *D.V. Displays*, 134 NLRB 568 (1961), the Board created a single exception to the rule requiring a separate

election for previously unrepresented fringe employees, an exception that applies only "*where . . . there is a question of representation in the historical unit* and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis . . ." 134 NLRB at 571 (emphasis added). In such a case, the Board decided, only one election among all the employees in the unit is appropriate, but emphasized that its decision was limited to circumstances where there was a question of representation in the historical unit. *Id.* & n. 11 ("this is the only factual situation we are passing upon."). *Accord New Berlin Grading Co.*, 946 F.2d at 532; *Photype, Inc.*, 145 NLRB 1268, 1272 & n. 8 (1964).

In the present case, the Board did not find any question of representation in the historical unit such as is necessary to authorize a unit-wide election under *D.V. Displays*. There was no question concerning representation as to the historical unit because Johnson Brothers had recognized Teamsters Local 792 as the representative of the seniority list employees and bargained with the union on their behalf for twenty years. Where, as here, a question of representation exists only among the fringe group, a unit-wide election is not warranted. Indeed, the Board has no authority to direct an election where no question of representation exists; a self-determination election confined to the fringe employees among whom a question of representation exists is the only way to allow the fringe employees any say as to their representation. *New Berlin Grading Co.*, 946 F.2d at 532.

In its Eighth Circuit brief the Board asserted that the Regional Director "determined that a question of representation existed" and cited the Regional Director's Decision and Direction of Election. Board Eighth Circuit Br. at 5. In the Decision and Direction of Election, however, the Regional Director expressly found "that the current [historical] unit represented by [Local 792] is limited to the 22

'seniority list employees[.]'" (A-71.) No question of representation was ever found to exist as to the seniority list employees or the historical bargaining unit.

Moreover, *D.V. Displays* is not applicable when another non-incumbent union is seeking to represent the fringe group on a different basis. 134 NLRB at 571. Teamsters Local 503 filed the original election petition in this case and in its Amended Petition asked to represent the very group denied a self determination election. (A-84.) In its Eighth Circuit brief, the Board admitted that Local 503 requested withdrawal of its petition because the Board found the petitioned-for unit to be inappropriate. Board Eighth Circuit Br. at 8. The withdrawal discloses how serious a departure from and rejection of the Board's own precedent the Decision and Direction of Election was.

In the Eighth Circuit, the Board framed its analysis of this issue as whether non-seniority list employees were disenfranchised and responded that they were not disenfranchised because "they were entitled to vote in the election . . ." Board Eighth Circuit Br. at 26. The issue, however, is *not* whether fringe employees were entitled to vote but rather whether the 22 already-represented seniority list employees and Local 792 members were also entitled to vote. If the seniority list employees were *not* entitled to vote, their participation in the election seriously compromised the rights of the non-seniority list fringe employees who were entitled to their own self-determination election.

In short, the Eighth Circuit's decision is flatly inconsistent with applicable case law and Board precedent. Contrary to the Eighth Circuit's decision, this case raises an important and straightforward question of law and well established principles of law dictate a contrary result. The conflict created by the Eighth Circuit's decision in this case on an

important matter makes this case appropriate for review by this Court. Sup. Ct. R. 10.1(a).[1]

CONCLUSION

The Eighth Circuit has erroneously resolved an issue critical to the fair operation of the National Labor Relations Act and the protection of employees' right to self-determination thereunder. The Eighth Circuit's resolution of this issue is flatly inconsistent with the Seventh Circuit's articulation of the law in *New Berlin*, among other cases. Johnson Brothers prays that the Court grant this petition for certiorari.

Dated: March 25, 1998.

Respectfully submitted,

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Attorneys for Petitioner Johnson Brothers Wholesale Liquor Co., Inc.

[1] In addition, the question presented is an important question of federal law which has not been, but should be, settled by this Court. Review is therefore also warranted under Sup. Ct. R. 10.1(c).

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1312/1666

Johnson Brothers Wholesale Liquor Co., Inc.,	*
	*
Petitioner,	* Order Denying Petition for Rehearing and Suggestion
vs.	* for Rehearing En Banc
	*
National Labor Relations Board,	*
	*
Respondent.	*

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 23, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 97-1312

Johnson Brothers Wholesale Liquor Co., Inc.,	*	
	*	
Petitioner,	*	
	*	
vs.	*	
	*	
National Labor Relations Board,	*	
	*	
Respondent.	*	
	*	On Petition for Review
No. 97-1666	*	from National Labor
	*	Relations Board
Johnson Brothers Wholesale Liquor Co., Inc.,	*	
	*	
Respondent,	*	
	*	
vs.	*	
	*	
National Labor Relations Board,	*	
	*	
Petitioner.	*	

JUDGMENT

These causes were submitted on a petition for review of an order from the National Labor Relations Board, on the administrative record, and briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the order of the National Labor Relations Board be enforced and that the Johnson Brothers Wholesale Liquor Co., Inc. abide by and perform the directions in said order in accordance with the opinion of this Court.

December 19, 1997

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1312

Johnson Brothers Wholesale Liquor Co., Inc.,

Petitioner,

v.

National Labor Relations Board.

Respondent.

On Petition for Review from National Labor Relations Board.

No. 97-1666

[UNPUBLISHED]

Johnson Brothers Wholesale Liquor Co., Inc.,

Respondent,

v.

National Labor Relations Board.

Petitioner.

Submitted: December 10, 1997
Filed: December 19, 1997

Before FAGG, WOLLMAN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Johnson Brothers Wholesale Liquor Co., Inc. (the Company) petitions for review of an order of the National Labor Relations Board (the Board), and the Board seeks to enforce the order against the Company. Having considered the record and the parties' arguments, we find no error in the Board's decision. Because our review involves the application of established principles of law in a fact-intensive case, and the parties' submissions show they are thoroughly familiar with the issues before the court, we conclude that an extensive discussion would serve no useful purpose. Accordingly, we enforce the Board's order without further discussion. See 8th Cir. R. 47B.

A true copy.

Attest

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the board volumes.

Johnson Brothers Wholesale Liquor Company *and* Teamsters Local 792. Case 18-CA-14241

January 17, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

Pursuant to a charge filed on October 23, 1996, the General Counsel of the National. Labor Relations Board issued a complaint on November 4, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 18-RC-15911. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On December 2, 1996. the General Counsel filed a Motion for Summary Judgment and brief in support. On December 4, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 18, 1996, the Union filed a statement in support of the General Counsel's

Motion for Summary Judgment. On December 24, 1996, the Respondent filed a memorandum in opposition to the Motion for Summary Judgment and in response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain but attacks the validity of the certification on the grounds that the unit is inappropriate, the election was contract-barred, the Respondent was not permitted to challenge ineligible voters during the election, the Union and Board agent engaged in objectionable activity during the election period, the petition violated the Union's agreement not to represent certain employees, and the Board failed to conduct an appropriate self-representation election among the previously unrepresented employees not covered by the contract.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation with au office and place of business in St. Paul, Minnesota has been engaged in the wholesale sale and distribution of liquor products. During the 12-month period ending December 31, 1995, a representative period, the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000, purchased and received at its St. Paul, Minnesota facility goods valued in excess of $50,000 directly from sellers located outside the State of Minnesota, and sold and shipped from its St. Paul, Minnesota facility goods valued in excess of $50,000 directly to purchasers located outside the State of Minnesota. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 16, 1996, the Union was certified on July 31, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time driver and warehouse employees employed by the Employer at its St. Paul, Minnesota facility, excluding office clerical employees, manager, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About August 12, 1996, the Union requested the Respondent to bargain, and, since about August 23, 1996, the Respondent has refused. We find that this refusal constitutes am unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 23, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964);

Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Johnson Brothers Wholesale liquor Company, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local 792 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time driver and warehouse employees employed by the Employer at its St. Paul, Minnesota facility, excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in St. Paul, Minnesota, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided

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[1] If this Order is enforced by a judgment of a United States Court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

by the Regional Director for Region 18 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C January 17, 1997

Margaret A. Browning, Member

Sarah M. Fox, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has fond that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Teamsters Local 792 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time driver and warehouse employees employed by us at our St. Paul, Minnesota facility, excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY

Employer

and

Case18-RC-15911

TEAMSTERS LOCAL 792

Intervenor

ORDER

Employer's Request for Review of the Regional Director's Second Supplemental Decision and Certification of Representative is denied as it raises no substantial issues warranting review. In denying this request, we note that the action of the Board agent in refusing to accept the challenges was consistent with Board Case Handling Manual Representation Proceedings (Part Two) (CHM) Section 11338.5. Further, with respect to the allegation that Union observers used an improper list, we note that an affidavit submitted by the Employer with its Request for Review identifies the list as "a voter list with annotations indicating who[m] they intended to challenge." Such a list is appropriate. See CHM Section 11338.2.

MARGARET A. BROWNING, MEMBER

SARAH M. FOX, MEMBER

JOHN E. HIGGINS, JR., MEMBER

Dated, Washington, D.C., September 24, 1996.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:

JOHNSON BROS.
WHOLESALE LIQUOR CO., INC.

Employer,

EMPLOYER'S REQUEST FOR REVIEW

and

TEAMSTERS LOCAL 792, IBT,

Intervenor.

Case 18-RC-15911

Date: August 13, 1996

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By: /s/

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ATTORNEYS FOR JOHNSON BROS.
WHOLESALE LIQUOR CO., EMPLOYER

I. INTRODUCTION

Johnson Bros. Wholesale Liquor Co., (the "Employer") hereby requests review by the National Labor Relations Board of the Second Supplemental Decision and Certification of Representative ("the Supplemental Decision") which was issued in this matter on July 31, 1996. The Employer's request is based upon the following grounds:

1. The Supplemental Decision raises substantial questions of law and policy by its departure from Board precedent;
2. The Supplemental Decision is based upon substantial factual errors which are clearly erroneous and prejudicial to the rights of the Employer;
3. The Supplemental Decision is based upon an insufficient investigation, and therefore violates Board Regulations.

II. PROCEDURAL BACKGROUND

The Employer is in the wholesale liquor distribution business and maintains an office and warehouse in St. Paul, Minnesota. (Tr.7 and 15, see App. #1).[1] The Employer currently employs approximately 99 full time and part time employees in its warehousing, driving, shipping and receiving operations, other than guards and supervisors. (Er. Exh. 6, see App. #2).[2] The Intervenor, Teamsters Local 792, is a "labor organization" within the meaning of the National Labor

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[1] References to the official hearing transcript from the representational hearing in this matter will be as follows: "Tr. [page no.]"

[2] References to hearing exhibits will be as follows: "Er." is the Employer; "Petr." is the Petitioner; "Int." is the Intervenor; and "Bd." Is the Board.

Relations Act. (Tr. 9, see App. #3). Intervenor Local 792 has been the duly authorized collective bargaining representative for a unit of the Employer's warehouse and driving employees since some time prior to 1979. (Tr.14, 17 and 29, see App. #4).

On March 6, 1996 Petitioner Teamsters Local 503 filed a petition seeking to represent a bargaining unit of the Employer's employees described as, "full time and regular part time individual truck owners," and excluding "all other employees. . . . " (Bd.Exh. 1(a), see App. #5). On March 14, 1996 the Petitioner filed an Amended Petition which seeks to represent a bargaining unit of the Employer's employees described as, "full time and regular part time individual truck owners, and part time, casual and all other unrepresented drivers and warehousemen employed by the Employer at its University Avenue W., St. Paul, MN location." (Bd.Exh. 1(e), see App. #6).

A hearing was conducted on the issues raised by the Amended Petition on March 26, 1966, at which time Local 792 was granted Intervenor status. (Tr. 6, see App. #7). The hearing record remained open thereafter until April 8, 1996 at which time the hearing officer received a list of the Employer's employees into the record as Employer's Exhibit 6, after which the record was closed.

The Employer and the Petitioner Local 503 filed timely briefs and the Regional Director issued his Decision And Direction Of Election on April 19, 1996. (Hereafter "the Decision," see App. #8)

In directing an election, the Regional Director found: (1) that the current bargaining unit represented by Intervenor Local 792 is limited to 22 "seniority list" employees rather than all of the warehouse employees and drivers as argued by the Employer; (2) that this limited unit is not appropriate; (3) that the current contract covering the 22 "seniority list" employees is not a bar to an election even though the contract

will not expire until May 31, 1997; and (4) that an election in an appropriate unit - consisting of all of the Employer's drivers and warehouse employees - with a 3-choice ballot, is warranted. (The Decision, App. #8).

On May 2, 1996, the Employer filed a request for the NLRB to review the Director's decision. On May 3, 1996, the Employer also filed a motion requesting the Regional Director to reconsider his decisions. The Motion for reconsideration was denied on May 6, 1996. (See Denial of Reconsideration, App. #9) The request for review was denied on May 16, 1996. (See Denial of Review, App.#10).

On May 8, 1996, the parties were informed that Local 503 had requested withdrawal from the election petition, and was being dropped from the ballot. (App. #11). Only Local 792 remained. The representational election was conducted in the unit designated by the Regional Director on May 16, 1996.

On May 23, 1996, JBL filed objections to the conduct of the elections. (Employer's Objections, App. #12). These objections included the following:

(1) Misconduct by the Board agent in that union observers of the elections challenged 18 voters as being ineligible. For each of these the Board agent followed the Board's normal rules and procedures and impounded the challenged ballots. But when observers for the employer challenged 23 voters, in only one case did the Board agent follow the normal procedures and impound the ballots. Also when one of the observers for the employer pointed out that union observers were utilizing voter lists, which the written instructions had prohibited, the Board's agent had permitted the union observers to continue utilizing those lists. Moreover the Board's agent handled these Employer objections in a summary and belittling manner in front of eligible voters who had not yet voted, causing them to be intimidated in connection with their own votes.

(2) Twenty-two employees who were already members of 792 and covered by an already existing CBA not scheduled to expire until May 31, 1997, were allowed to vote despite the fact that their ballots were challenged in a timely manner by the employer.

(3) Between the date of filing of the petition and the date of the election, Local 792, through its agents and representatives, made representations to employees that certain supervisors were in support of the union. Such assertions were false.

On June 3, 1996 the Employer filed a Position Statement Regarding Objections, which included descriptions of the objectionable conduct and the names, addresses, and phone numbers of witnesses who could testify as to such conduct. (Employer's Position Statement Regarding Objections, App.#13).

On July 31, 1996 the Regional Director overruled the Employer's objections in their entirety, and certified the Local 792 as the exclusive bargaining representative of the employees in the appropriate unit. (The Supplemental Decision, App. #14).

III. ISSUES REQUIRING REVIEW

A. The Regional Director's Finding, That The Conduct Of The Board's Agent In Refusing To Impound The Ballots Challenged By The Employer Was Not Erroneous, Is Contrary To The Published Regulations Governing The Conduct of Elections, Is A Departure From Officially Reported Board Precedent, And Has Resulted In Prejudicial Error To The Employer.

B. The Regional Director's Finding, That The Board's Agent's "Summary and Belittling" Manner Of Handling The Employer's Ballot Challenges And His Decision To

Ignore The Use Of A Voter List By The Union Observers Was Not Erroneous Or Objectionable, Is A Departure From Officially Reported Board Precedent, And Resulted In Prejudicial Error To The Employer.

C. The Regional Director's Findings Indicate A Failure To Conduct A Sufficient Investigation Of The Employees Objections. Such Failure Constitutes A Violation Of The Regulations Governing The Handling Of Objections And Requires That The Case Be Remanded To The Regional Director For A Complete Investigation.

D. The Regional Director's Finding, That No "Good Cause" Existed For Challenging 22 Voters Who Were Already Members Of A Collective Bargaining Unit For Which An Existing Collective Bargaining Agreement Was In Effect, Was Clearly Erroneous and A Departure From Officially Reported Board Precedent.

IV. FACTS

During the conduct of the election, the observers for the Union challenged eighteen voters as being ineligible. (Employer's Position Statement, p.1, App.#13). In each case, the Board agent followed the Board's rules and normal procedures and impounded the challenged ballot recording the identity of the voter and the reason for the challenge. (Id.) During the election, the observers for the Employer challenged twenty-three voters as being ineligible. (Id. at 1-2). In only one case did the Board agent follow the Board's rules and normal procedure of impounding the ballot, identifying the voter, and recording the reason for the challenge. (Id. at 2). In all the other twenty-two cases, the Board agent refused to place the ballot in an envelope, record

the identity of the voter or list the reason given for the challenge. (Id.)

During the conduct of the election, one of the Employer's observers noted that the two Union observers were utilizing a list of voters they brought with them to the election. (Id.) This surprised the observer because he had been provided some written instructions by the Board agent indicating that the observers were not allowed to bring lists of voters to the election nor utilizing them during the election. (Id.) The Employer's observer brought this to the attention of the Board agent, who continued to allow the Union observers to possess and utilize said voter lists. (Id.)

All of the foregoing conduct relating to the agent - impounding the challenged votes made by the Union, refusing to impound the challenged votes made by the Employer, and refusing to take action on the Employer's request regarding the Union's use of voter lists occurred in front of a line of eligible voters, some of whom were only two or three feet away, waiting to vote. (Id.) In doing so, the Board agent gave the eligible voters the impression that the Board preferred the Union to the Employer in the election.

V. ARGUMENT

A. The Regional Director's Finding, That The Board's Agent's Refusal to Impound The Challenged Ballots Was Not Erroneous, Is Contrary To Published Regulations Governing The Conduct Of Elections And Constitutes Reversible Error.

The Board Agent's refusal to impound the ballots challenged by the Employer's observer violated the regulations governing the conduct of representational elections. Federal Regulations give any authorized election observer or Board agent a right to challenge a voter in a

representational election. 29 CFR § 102.69(a) (1996). The regulation further provides that when an observer challenges a voter, the ballot of that voter "shall be impounded." Id. If the number of challenged ballots are sufficient to affect the results of the election then the regional director must initiate an investigation. Id. at § 102.69(c)(1).

An agency's decision not to follow its own regulations is considered arbitrary and capricious, and an abuse of discretion. Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir.1986), Carter v. Sullivan, 909 F.2d 1201, 1202(8th Cir. 1990). When such a decision affects a party's interests, a reversal is required irrespective of whether the same result would have resulted if the regulation had been followed. Montilla v. Immigrations and Naturalization Service, 926 F.2d 162 (2d Cir. 1991).

The Regional Director asserts that the agent's refusal to impound the ballots was proper because the employer's observer was deemed to not have "good cause" for challenging the ballots within the meaning of § 102.69(a). Supplemental Decision, p.5. This reading of the regulation is erroneous. The regulation gives the agent no such discretion to determine whether a challenge is for "good cause" or not. Nowhere in the regulation does it state that the Board agent may evaluate the challenge prior to impounding the ballot. This defeats the purpose of the rule which is to avoid disruption at the polling place and avoid even the appearance of partiality by the agent conducting the election.

Rather, this evaluation is to be conducted by the Regional Director in the course of the investigation mandated in § 102.69(c)(1). A reading of the regulation which would allow this sort of evaluation by the agent would render subsection (c)(1) superfluous. There would be no point to requiring investigations of challenges if they could be disposed of by the Board's agent at the time they are made. Since the regulation provides a process for evaluating a challenge to a

ballot, it must be inferred that this process was intended to be utilized.

To allow the Board agent to utilize his discretion in determining which challenges warrant the impounding of ballots and which do not would short circuit the intent of the regulation. Nowhere does the regulation say that the agent "may impound a ballots if he finds the challenge to be valid." Rather it states that challenged ballots "shall be impounded," and makes no reference to agent evaluation of the challenge. The use of the term "shall" eliminates any suggestion of agent discretion in this matter. In summary, then, the agent is not an evaluator of the challenge, but simply a conduit through which the challenge must pass on its way to the evaluation process.

Therefore the Board agent's refusal to impound the challenged ballots violated the regulation. This violation requires the setting aside of the election. In Montilla v. Immigration and Naturalization Service an immigration judge found that the deportability of the petitioner had been established at a hearing in which the petitioner had no counsel, and during which he had not waived his right to counsel. 926 F.2d at 164-65. The governing regulation clearly stated that deportee must be informed of his right to representation and must state on the record whether or not he desires such representation. Id. at 166. The appellate court stated that where a party's interests are affected agencies must follow their own procedures. Id. at 167. Furthermore it held that even if following the regulation would likely have produced the same result, a violation of that regulation still required reversal. Id. at 170.

In the present case the regulation was clearly violated. Additionally the Employer has an interest in the outcome of the election. Therefore, as Montilla demonstrates, it is incumbent on the Board to reverse the decision of the Regional Director in over ruling the Employer's objection to

the Agent's refusal to impound the challenged ballots. Simply put, the Employer is entitled to the process accorded it in the regulation.

B. The Regional Director's Finding, That The Board Agent's "Summary and Belittling" Manner of Handling The Employer's Ballot Challenges And His Decision To Ignore The Use Of A Voter List By The Union Observers Was Not Erroneous or Objectionable, Is A Departure From Officially Reported Board Precedent And Resulted in Prejudicial Error to The Employer.

When the Board Agent, while standing within a few feet of employees getting ready to vote, belittled the Employer's challenges to ballots, refused to properly impound those ballots, and refused to prevent the Union observer's use of a voter list in violation of published rules, he sent a message to the voters that the Board opposed an Employer victory in the election. However, Board precedent clearly establishes that Board agents must maintain the integrity and neutrality of election procedures, and must insure that their actions do not leave an impression in the minds of the voters that the Board is not neutral. Hudson Aviation Services, Inc., 288 NLRB 870 (1988), Glacier Packing Co., Inc., 210 NLRB 571 (1974), Athbro Precision Engineering Corp., 166 NLRB 966 (1967).

In Hudson Aviation a Board Agent argued loudly with a employer-supervisor during an election. 288 NLRB at 870. The Board found that this conduct communicated an impression that the Board was displeased with and was criticizing the supervisor, and that this undermined the perception of Board neutrality. Id. This loss of perceived neutrality was deemed sufficient to set aside the election. Id. at 871.

In Glacier Packing, a Board Agent communicated a similar lack of neutrality in an election by ripping small "vote neither" cards off the shirts of employer observers, either tearing them into little pieces or crushing them into little balls, and then verbally chastising those observers. 210 NLRB at 571-72. The Board found that even though the observers may have been violating election rules by wearing such cards, the agent's manner and remarks could have been interpreted as indicating the Board opposed the employer's position in the election. Id. at 573. Again, this was sufficient to require the setting aside of the election. Id.

As in these cases, the agent in the present case also communicated a message of Board bias to the voters. First, by refusing to follow established Board procedures requiring the impounding of the ballots challenged by the Employer, while at the same time following those same procedures with respect to the challenges made by the Union observer, the Agent made clear to all employees observing the exchanges that he would insure the maximum number of votes for the union. This clearly is not neutral. As the cited cases make clear, it is the impression left with voters that is important here. In the present case that impression, to all who witnessed or heard about the agent's actions, was that the Board favored a union victory.

This impression was further enforced by the Agent's refusal to confiscate a voter list being used by the union observers. When the Employer's observer pointed out that this was contrary to written instructions given to the observers, the agent's refusal to enforce those instructions communicated, to all employees who witnessed that exchange, the message that the Board would enforce the rules only against the Employer. This clearly violates the requirement of not only maintaining neutrality, but also of maintaining the perception of neutrality.

The Director's decision not to set aside the election, in the face of the biased actions of the Agent, runs counter to teachings of the cited cases. However the Director's Supplemental Decision does not even recognize this conflict. He simply states that he can not see how employees would feel intimidated or belittled by not having their ballots impounded. He misses the point. It is not that the employees feel threatened, but that they perceive a bias at work in the Agent's actions, that is the fundamental point. The Board's decisions make clear that whenever the Board's standards of neutrality are impugned, grounds exist for the setting aside of the election.

Also, contrary to the Regional Director's statement that the use of a voter list is an accepted practice, Board precedent makes clear that the use of a voter list may be grounds for setting an election aside whenever it can be shown that employees believed their names were being recorded. Southland Containers, 312 NLRB 1087 (1993). This, obviously, was the concern of the Employer's observers when they questioned the union's use of the list. Yet the Director again does not even recognize the concern, dismissing the objection by offering alternative uses of a list.

Case law clearly establishes that if the Board is going to depart from established precedent, then it must explain that departure, or at least distinguish its decision from the past precedent. See B. B. & L. v. NLRB, 52 F.3d 366, 369 (D.C.Cir.1995), Drug Plastics & Glass v. NLRB, 44 F.3d 1017, 1022 (D.C.Cir.1995). In this case the Director does neither. It is therefore incumbent upon the Board to make up for the insufficiencies of the Director's Supplemental Decision.

C. The Regional Director's Findings Indicate A Failure To Conduct A Sufficient Investigation Of The Employer's Objections. Such Failure Constitutes A

Violation Of The Regulations Governing The Handling Of Objections And Requires That The Case Be Remanded To The Regional Director For A Complete Investigation.

The Regional Director's Supplemental Decision indicates a failure on the part of the Regional Director to investigate the Employer's objections and allegations. Federal regulations governing the handling of objections requires that "if timely objections are filed to the conduct of the election or to conduct affecting the results of the election ... the regional director **shall ... initiate an investigation**, as required, of such objections or challenges." 29 CFR § 102.69(c)(1)(1996) (emphasis added). The regulation clearly places the burden on the Regional Director to conduct a full investigation of the employer's objections. This is not the employer's obligation. In fact an employer would risk violating section 8(a)(1) of the NLRA by interviewing employees about such election conduct, as it could be construed as being harassment. The Board has held that the critical prerequisite to **a full investigation** of the allegations presented in objections is the submission of the names of witnesses who can provide direct relevant testimony. Heartland of Martinsburg, 313 NLRB 655 (1994); Holladay Corp., 266 NLRB 621 (1983)(emphasis added). The Regional Director abuses his discretion when such a prerequisite is met but a full investigation is not had. Id.

In both Heartland and Holladay the employer filed objections, provided descriptions of the objectionable conduct, and supplied the names of witnesses who could provide testimony relating to the objectionable conduct. Id. In both cases the Regional Director overruled the objections without investigations because the objecting parties had not attached. affidavits from these witnesses. Id. The Board held that the governing regulation did not require affidavits, and

emphasized that the submission of names of witnesses is the crucial prerequisite to a full investigation. Id. The logical extension of this requirement is that a full investigation will include the examination of these witnesses.

In the present case the Employer's Position Statement Regarding Objections described the objectionable conduct of the Board's agent, and provided names, addresses, and phone numbers of witnesses who possessed relevant testimony. The Employer thereby met requirements espoused in Holladay and Heartland for a full investigation of its allegations.

The Regional Director's Supplemental Decision evidences a failure to provide a full investigation. First, the Regional Director's treatment of the Employer's objections to the union misrepresentation indicates that no evidence was provided to support these allegations. In fact the Employer did provide a specific example of the objectionable conduct, as well as the names and addresses of the witnesses. However the Supplemental Decision makes no reference to any investigative communications with these witnesses. In fact, the Supplemental Decision gives no suggestion that the Regional Director performed any investigation beyond simply reading the Employer's Objections and Position Statement.

Had the Regional Director questioned the witnesses he would not have been able to state that "there is no evidence that the alleged misrepresentation by Machio included anything more than potentially a misstatement . . ." Supp. Decision, 4. The Supplemental Decision's treatment of it strongly suggests the Regional Director failed to fulfill his regulatory duty to investigate.

Secondly, when considering whether the Agent's conduct improperly influenced the voters, the Regional Director states that he "can think of no objective reason for believing that a voter would reasonably tend to feel belittled or intimidated by a Board agent's refusal to impound his or her ballot, or by watching a Board agent refuse to impound another voter's

ballot." Supp. Decision, 5. However the question is not simply one of what the Regional Director could "think" might influence the voters, but also one of fact as to whether such conduct actually did influence the voters.

Again, the Employer supplied the names, addresses, and phone numbers of witnesses who could testify as to this. Additionally the Regional Director was free to make inquiries of any of the rank and file employees present. Had he done so there would have been no need for the abstract consideration which the Regional Director gave to the issue. Instead the witnesses could have provided testimony either in support of, or in opposition to, the Employer's allegations. The Supplemental Decision, however, indicates that no such testimony was taken, much less considered.

Finally, the Regional Director's treatment of the allegations relating to the union's use of a voter list also indicates that he did not make a full investigation of the Employer's objections. The Regional Director's holding that the use of the list did not rise to the level of objectionable conduct was based on his speculation that the list may have been being put to an appropriate use. Supp. Decision, 6. The Regional Director also criticized the Employer for not explaining what "utilizing" a list meant. Id.

It was not the Employer's obligation to define precisely what "utilize" means. The election rules which were handed out simply stated that voter lists were not to be used. The union observers possessed and were using lists. Precisely what they were using the lists for is a question to be answered by a full investigation. The Employer satisfied his obligation by supplying to the Regional Director a list of witnesses to the conduct. Additionally the Regional Director was free to question the rank and file employees, as well as the union observers themselves. Had a complete investigation been done there would have been no need for speculation as to the purpose of the list, for evidence was available. Yet

speculation is what the Regional Director offers in support of his finding. Clearly the Regional Director had an obligation to provide more: namely a full investigation.

Thus the Regional Director's treatment of the Employer's objections is evidence that none of the listed witnesses was ever questioned. Therefore a full investigation, as required by regulation and Board precedent, was not conducted. It is clearly the Regional Director's obligation to conduct a full investigation, not the employer's. His failure to do so requires the setting aside of the Supplemental Decision, and a remand back to the Regional Director for a full investigation.

Although we have no procedural obligation to do the investigative work for the NLRB, we are, by this Request for Review, attaching affidavits of the Employer's observers, Paul Blake and Paul Michaelski. (App.#16).

D. The Regional Director's Finding, That No "Good Cause" Existed For Challenging 22 Voters Who Were Already Members Of A Collective Bargaining Unit For Which An Existing Collective Bargaining Agreement Was In Effect Was Clearly Erroneous and A Departure From Officially Reported Board Precedent.

See Employees Representational Case Brief (attached, App. #15).

IV. CONCLUSION

The Board Agent's refusal to impound the ballots challenged by the Employer violated the regulations governing the conduct of the election, and denied the Employer the process which he was due. Furthermore, the summary and belittling manner in which the Agent handled these challenges, as well as the employer observer's objections

to the union's use of a voter list, communicated a message of Board bias to the employees. Finally the Supplemental Decision itself shows that the Regional Director failed to conduct a full investigation of the objections. The Regional Director's Supplemental Decision affirming the Agent's actions is therefore erroneous and not based on substantial evidence, and should be reversed by the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY Employer and TEAMSTERS LOCAL 792 Intervenor	Case 18-RC-15911

SECOND SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a petition filed on March 6, 1996,[1] and Decision and Direction of Election which issued on April 19, an election by secret ballot was conducted on May 16 among certain employees of the Employer.[2] The initial tally showed challenged ballots sufficient to affect the results of the election. On June 7, I issued a Supplemental Decision and Order directing that eight challenged ballots be opened and counted. The Employer filed a request for review of that decision, which was denied on July 15. The results of the

[1] Unless otherwise indicated, all dates are 1996.

[2] The directed unit is as follows:

All full-time and regular part-time driver and warehouse employees employed by the Employer at its St. Paul, Minnesota facility; excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

election are set forth in the Revised Tally of Ballots which issued at the conclusion of the supplemental count.[3] The remaining challenged ballots are not sufficient to affect the results of the election.

In addition, on May 23, the Employer timely filed objections regarding the election, a copy of which is attached hereto. Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, I have caused an investigation of the objections to be conducted and hereby report as follows:

THE OBJECTIONS

The Employer presents three numbered objections. First the Employer claims the Union made misrepresentations to unit employees as to their voting eligibility, a supervisors alleged position on the election question, employees' coverage under an existing collective bargaining agreement between the parties in the event the Union won the election, and the effects of a loss in the election on the Union's status as collective bargaining representative. Second, the Employer claims 22 employees covered by an existing collective bargaining

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[3]

	Original Tally	Challenged Counted	Final Tally
Approximate number of eligible voters	100		100
Number of void ballots	0		0
Number of votes cast for Teamsters Local 792	43	2	45
Number of votes cast against participating labor organization	26	6	32
Number of valid votes counted	69	8	77
Number of challenged ballots	19		11
Number of valid votes counted plus challenged ballots	88		88

agreement between the parties were improperly allowed to vote in the election despite the Employees attempt to challenge their eligibility. Third, the Employer claims that the Board agent conducting the election engaged in misconduct by improperly refusing its challenges to the aforementioned 22 employees.

On June 3, the Employer timely presented its evidence in support of some of its objections in a Position Statement Regarding Objections. In support of its first objection regarding misrepresentations, the Employer alleges that a union steward, Michael Marchio, told employee Eric Grandquist that warehouse manager Greg DuChaine favored the Union and wanted Grandquist to support the Union, but that DuChaine also did not want other managers to know that he supported the Union. In addition, the Employer alleges that an employee described only as "a Union supporter," Steve Thoemke, told Eric Grandquist that he should not vote in the election.

In support of its second and third objections, the Employer alleges that the Board agent acknowledged numerous challenges made by the Union's observers and marked and impounded the challenged voters' ballots pursuant to standard operating procedures, while refusing to act on the Employers observers' requests to challenge 22 Voters. Those 22 voters, according to the Employer, should not have been allowed to vote because they are covered by a contract between the parties that does not expire until May 31, 1997 and because they do not share a community of interest with other employees in the bargaining unit. In addition, the Employer alleges for the first time that the Board agent allowed the Union's observers to "utiliz[e] a list of voters they brought with them to the election." The Employer argues that such conduct "gave the eligible voters the impression that the Board preferred the Union to the Employer in the election."

I find that the Employer's objections should be overruled. Even if all the facts alleged in the objections and Position Statement Regarding Objections are true, they would not warrant setting aside the election.

First, regarding objection number one on misrepresentations, I note that the Employer failed to present any evidence in support of its initial allegations that Union agents misrepresented whether employees would automatically be covered by the existing collective bargaining agreement with or without further negotiations, or that Union agents misrepresented whether the contract would remain in force even if the Union lost the election. Accordingly, those objections must be rejected. See, e.g., TA Investment Co., 300 NLRB 473 (1990).

In any event, the only misrepresentations currently cognizable as objectionable conduct involve forgery of government documents implicating the Board's neutrality in the election. AWB Metal, Inc., 306 NLRB 109 (1992); Midland National Life Ins. Co., 263 NLRB 127 (1982). None of the misrepresentations alleged by the Employer involve forged documents or implicate the neutrality of the Board in the election, so they do not present a prima facie case of conduct unlawfully affecting the results of the election. See, e.g., Park Chevrolet-Geo, Inc., 308 NLRB 1010 (1992). In addition, there is no evidence that the alleged misrepresentation by Marchio included anything more than potentially a misstatement of DuChaine's position, such as a threat or promise, or that Thoemke was an agent of the Union.

The Employer's second and third objections essentially raise the same issue litigated and decided in a pre-election hearing and my Decision and Direction of Election. Assuming the Employers allegations to be true, I still find no evidence of interference with the election warranting another hearing on these issues.

Teamsters Local 503 originally petitioned for a unit of drivers and warehouse employees not covered by the parties' existing contract, and the Union intervened on that petition. The Employer contended there was no such appropriate unit because all drivers and warehouse employees were covered by the contract. Based on the Employers evidence, I found that the contract covered only twenty drivers or warehouse employees (plus an indefinite number of others on approved leaves of absence) chosen by the Employer, generally based on their seniority. I concluded that the only appropriate bargaining unit was all drivers and warehouse employees and the contract's arbitrary limitation on the unit prevented it from barring an election. The Employer requested review of that Decision, which was denied by the Board on May 16, 1996.

The basis for the Employers challenges to 22 voters at the polling site was solely those employees' inclusion in the contract unit and the resulting bar, the issue resolved in the Decision and Direction of Election. There was thus no "good cause" for challenging them within the meaning of Section 102.69(a) of the Board's Rules and Regulations, and the Board agent's refusal to impound their ballots merely to assist in relitigation of that issue was not erroneous. Moreover, the Employer offers no particularized evidence in support of its conclusionary allegation that the Board agent handled the Employers observers attempted challenges in a "summary and belittling manner" such that voters waiting in line would be "intimidated in connection with their own votes." I can think of no objective reason for believing that a voter would reasonably tend to feel belittled or intimidated by a Board agent's refusal to impound his or her ballot, or by watching a Board agent refuse to impound another voters ballot

Finally, although not timely raised in its objections, the Employer also claims in its Position Statement in Support of Objections that the impression of partiality allegedly conveyed by the Board agent's refusal to act on its challenges

was buttressed by the Board Agent's decision to ignore the fact that the Union's observers, "[d]uring the conduct of the election,... were utilizing a list of voters they brought with them to the election." The Employer does not allege that the Union's observers made a list while observing of those who had or had not voted. In addition, the Employer does not otherwise explain what "utilizing" means. Even if this allegation was timely and properly raised, I would find it does not rise to the level of objectionable conduct. The list the Union's observers brought with them may well have been a list of employees they intended to challenge, which is a common and accepted practice. Based on the above, I cannot find that the Union's observers kept an improper list.

I find that objections 1, 2, and 3 are without merit. Accordingly, the Employers objections are overruled in their entirety.

CONCLUSION

Having overruled the Employers objections in their entirety, and as the Union has received a majority of the valid ballots cast, I shall certify it as the exclusive bargaining representative of the employees in the appropriate unit

CERTIFICATION OF REPRESENTATIVE

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Teamsters Local 792, and that pursuant to Section 9(a) of the National Labor Relations Act, as amended, said labor organization is the exclusive representative of the employees in the unit set forth below for the purpose of collective

bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.[4]

Unit:

All full-time and regular part-time driver and warehouse employees employed by the Employer at its St Paul, Minnesota facility; excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

Dated at Minneapolis, Minnesota, this 31st day of July, 1996.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board
316 Federal Courts Building
110 South Fourth Street
Minneapolis, Minnesota 55401

Attachment

[4] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Second Supplemental Decision may be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has submitted timely to the Regional Director ins support of objections and which are not included in the Second Supplemental Decision are not a part of the record before the Board unless appended to the request for review, or opposition thereto which a party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Second Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding. The request for review must be received by the Board in Washington by August 14, 1996.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY Employer and TEAMSTERS LOCAL 792 Intervenor	Case 18-RC-15911

SUPPLEMENTAL DECISION AND ORDER

Pursuant to a petition filed on March 6, 1996, and Decision and Direction of Election which issued on April 19[1] an election was conducted on May 16 among certain employees of the Employer.[2] The results of the election are set forth in the Tally of Ballots which issued at the conclusion of the election.[3] The challenged ballots are sufficient to affect

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[1] Unless otherwise indicated, all dates are 1996.

[2] The directed unit is as follows:

> All full-time and regular part-time driver and warehouse employees employed by the Employer at its St. Paul, Minnesota facility; excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

[3] Approximate number of eligible voters 100
Number of void ballots 0
Number of votes cast for Teamsters Local 792 43
Number of votes cast against participating labor organization 26

the results of the election. On May 23, the Employer filed timely objections affecting the results of the election, a copy of which was duly served on the Intervenor. I have completed my investigation of certain of the challenged ballots and hereby find:

CHALLENGED BALLOTS

The Intervenor challenged the ballots of Justin Malvick, Dave Keding, and Scott Hennessey on the grounds that they were hired after the eligibility date; Paul Blake, Paul Michalski, Jim Carroll, and Malcolm Cloud on the grounds that they were supervisors or managerial employees within the meaning of Section 2(11) of the Act; John Peterson and Adrian DuChaine on the grounds that they were relatives of management; and Mike O'Gary, Tim Kershaw, Sally O'Keefe, Michelle Nitti, Joe Smith, Bob Sazevich, Mark Madden, Scott Seuberth, and Bruce Bergman on the grounds that they worked in job classifications not included in the directed unit. The Employer challenged the ballot of Scott Morrell on the ground that he is a relative of management.

In its Position Statement Regarding Challenged Ballots, the Intervenor withdrew its challenges to the ballots of Scott Hennessey, Dave Keding, Justin Malvick, Malcolm Cloud, and Paul Michalski. The Employer contends that Hennessey, Keding and Malvick are eligible voters and presented evidence that they were hired and began working on March 29, well before the eligibility date which was April 12. In addition, the Employer contends that Cloud and Michalski are eligible voters and presented evidence that they perform the same duties as other unit employees and possess none of the

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Number of valid votes counted 69
Number of challenged ballots 19
Number of valid votes counted plus challenged ballots 88

supervisory indicia listed in Section 2(11) of the Act. In view of the foregoing, I conclude that Hennessey, Keding, Malvick, Cloud and Michalski are eligible voters and direct that their challenges be overruled, and their ballots be opened and counted.

The Intervenor contends that Adrian DuChaine is the son of the Employer's warehouse manager, and that John Peterson is the son of the Employer's sales manager, and that such relationship alone justifies their exclusion from the unit. The Intervenor offers no claim nor presented any evidence that Adrian DuChaine or John Peterson are individuals "employed by [their] parent or spouse" within the meaning of Section 2(3) of the Act. The Intervenor also presented no evidence that they enjoy any special terms or conditions of employment not enjoyed by other unit employees as a result of their relationship to supervisors of the Employer. The Employer contends that neither parent has an ownership interest in it and that neither employee enjoys any special terms or conditions of employment as a result of their relationship to supervisors. In view of the foregoing, I conclude that DuChaine and Peterson are eligible voters and direct that their challenges be overruled and their ballots be opened and counted.

The Employer contends that Scott Morrell is the son of Debbie Morrell, a manager in its finance and accounting area. The Employer offers no claim nor presents any evidence that Morrell is an individual "employed by his parent or spouse" within the meaning of Section 2(3) of the Act or that he enjoys any special terms or conditions of employment not enjoyed by other unit employees as a result of his relationship to a supervisor of the Employer. The Employer contends, however, that if Adrian DuChaine and John Peterson are excluded, so should be Morrell because of equivalent family status. The Intervenor contends there is no basis for excluding Morrell from the unit and that his ballot should be opened and counted. In view of the foregoing, I conclude that

Morrell is an eligible voter and direct that the challenge to his ballot be overruled and his ballot be opened and counted.

CONCLUSIONS AND ORDER

The undersigned concludes that the ballots of Scott Hennessey, Dave Keding, Justin Malvick, Malcolm Cloud, Paul Michalski, Adrian DuChaine, John Peterson, and Scott Morrell raise no issues concerning their eligibility and that the challenges to their ballots should be overruled. The parties' positions make clear that they agree that Hennessey, Keding, Malvick, Cloud, and Michalski are eligible and their ballots should be counted. Assuming the parties' contentions regarding Adrian DuChaine's, John Peterson's, and Scott Morrell's relationships to supervisors are true, there is still no basis for excluding them. See, e.g., Allen Servs. Co., 314 NLRB 1060,1062-1063 (1994).

IT IS HEREBY ORDERED that the Intervenor's challenges to the ballots of Scott Hennessey, Dave Keding, Justin Malvick, Malcolm Cloud, Paul Michalski, Adrian DuChaine, and John Peterson, and the Employer's challenge to the ballot of Scott Morrell, be overruled; that their ballots be opened and counted; and that a revised tally of ballots be issued.

IT IS FURTHER ORDERED that if the tally of ballots shows that a majority of votes has been cast for the Intervenor, further investigation of the Employer's objections to conduct affecting the election will ensue; and that if the tally of ballots shows that a determinative number of challenges still remains, further investigation of the remaining challenges as well as the Employer's objections will ensue.[4]

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[4] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g) of the Board's Rules, documentary evidence, including

Dated at Minneapolis, Minnesota, this 7th day of June, 1996.

/s/

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board
316 Federal Courts Building
110 South Fourth Street
Minneapolis, Minnesota 55401

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affidavits, which a party has submitted timely to the Regional Director in support of its objections and which are not included in the Supplemental Decision are not a part of the record before the Board unless appended to the request for review, or opposition thereto which a party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding. The request for review must be received by the Board in Washington by June 21, 1996.

FORM NLRB-4168
(10-79)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY
Employer

and

TEAMSTERS LOCAL 792
Intervenor

Case No. 18-RC-15911
Date Issued July 17, 1996
Type of Election:
(Check one)
☐ Consent Agreement
☐ Stipulation
☐ Board Direction
☒ RD Direction

(Also check box below where appropriate)
☐ 8 (b) (7)

REVISED TALLY OF BALLOTS
(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the Regional Director on July 17, 1996 and the addition of these ballots to the original Tally of Ballots, executed on April 19, 1996, were as follows:

	ORIGINAL TALLY	CHALLENGED COUNTED	FINAL TALLY
Approximate number of eligible voters	100		
Void ballots	0		
Votes cast for: Teamsters Local 792	43	2	45
[illegible]			
[illegible]			
Votes cast against participating labor organization(s)	26	6	32
Valid votes counted	69		
Undetermined challenged ballots	19		11
Valid votes counted plus challenged ballots	88		
Sustained challenges (voters ineligible)			

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are (not) sufficient to affect the results of the election.

A majority of the valid votes plus challenged ballots as shown in the Final Tally column has [illegible] been cast for TEAMSTERS LOCAL 792

For the Regional Director, Region Eighteen

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the final tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

FOR JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY

FOR TEAMSTERS LOCAL 792

FOR

FOR

GPO 948 699

BEST AVAILABLE COPY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Johnson Bros. Wholesale Liquor Co., Inc.

Employer, Case 18-RC-15911

and

Teamsters Local 503, **EMPLOYER'S OBJECTIONS**

Petitioner,

and

Teamsters Local 792,

Intervenor.

Johnson Brothers Wholesale Liquor Company, ("the Employer"), pursuant to 29 C.F.R. § 102.69, for its objections to the representation election which was conducted on May 16, 1996, by the Regional Director, Eighteenth Region, National Labor Relations Board, in the above entitled matter, states and alleges as follows:

INTRODUCTION

On March 6, 1996 Teamsters Local 503 ("the Petitioner") filed a petition seeking to represent a bargaining unit of the Employer's employees described as, "full-time and regular part-time individual truck owners," and excluding "all other employees..." On March 14, 1996 the Petitioner filed an amended Petition seeking to represent a bargaining unit of

"full-time and regular part-time individual truck owners, and part-time individual truck owners, and part-time casual and all other unrepresented drivers and warehousemen employed by the Employer at its University Avenue W., St. Paul, MN location."

At a March 26, 1996 hearing, Teamsters Local 792 ("the Intervenor"), was granted intervenor status. Since some time prior to 1979, the Intervenor has represented a bargaining unit of the Employer's drivers and warehousemen who are currently covered by a collective bargaining agreement which is not scheduled to expire until May 31, 1997. At the March 26, 1996 hearing, the Employer presented evidence establishing that the petition and amended petition are untimely and that any election pursuant thereto is barred under the contract bar doctrine. At the hearing, neither any of the parties nor the hearing officer asserted a position as to the "inappropriateness" of the existing bargaining unit under the current collective bargaining agreement. Thus, no evidence was presented directed at this issue.

On April 19, 1996, the Regional Director issued a Decision and Direction of Election which, *inter alia*, found that the current unit represented by Intervenor Local 792 "is not appropriate" and directed that an election be held in a unit consisting of all of the Employer's drivers and warehouse employees using a three choice ballot.

On May 8, 1996 Petitioner Local 503 withdrew its petition and the Regional Director issued an Amended Notice of election with only Intervenor Local 792 on the ballot.

SPECIFIC OBJECTIONS

1. **Union Misrepresentations.** Between the date of the filing of the petition and the date of the election, Intervenor Local 792, through its agents and representatives, made certain representations to employees within the proposed

bargaining unit which were materially false and which were made with the purpose and effect of interfering with the "laboratory conditions" necessary for the conduct of a fair election and for the purpose and effect of interfering with the free choice of the employees in the proposed collective bargaining unit. These false statements included (a) that certain employees would should not try to vote because their names had been removed from the eligibility list or they were otherwise ineligible, (b) that plant manager Greg Duchaine really wanted employees to vote for the union but didn't want the Employer's management to know he was in favor of the union, (c) that if the union won the election, all employees in the new collective bargaining unit would immediately have their wage and benefit levels raised to those in the current contract, automatically, without the need for any further bargaining, and (d) that in the event the union lost the election, Intervenor Local 792 would not be decertified as the collective bargaining representative of the employees covered under the current contract but it would continue in full force and effect as if there had not been an election.

2. **Improper Voting By Employees Covered By The Current Collective Bargaining Agreement.** Twenty-two employees who are covered by the current collective bargaining agreement, who already are members of an existing unit appropriate for bargaining, and who already are members of Intervenor Local 792, were allowed to cast votes which were counted in the election despite the fact that said collective bargaining agreement is not scheduled to expire until May 31, 1997 and despite the fact that said ballots were challenged in a timely manner by the Employer.

3. **Misconduct By Board Agent.** During the conduct of the election, the observers for the Employer timely challenged twenty-two voters as being ineligible, which challenges were refused and ignored by the Board agent responsible for the proper conduct of the election. Instead of

following normal Board procedures and allowing said challenged employees to vote utilizing challenged ballot envelopes to preserve a record of their identity as well as to preserve a record of their individual votes until the legitimacy of the challenges could be verified, the Board agent summarily overruled the challenges. The Board agent allowed these twenty-two ballots to be co-mingled with all others making it impossible to ascertain their identity or eligibility to vote in a post-election proceeding. Moreover, the Board agent's handling of these Employer objections in such a summary and belittling manner, in front of eligible voters who had not yet voted, caused them to be intimidated in connection with their own votes.

CONCLUSION

By the acts described above, and by other similar acts and conduct, the atmosphere in which the election was held was so contaminated as to render a free and uncoerced election impossible, and the employees were not able to vote under conditions as guaranteed by the Act. Due to the described conditions, the Employer requests that the election be set aside.

Dated: May 23, 1996

LAW OFFICES OF MARTIN L. GARDEN

By: /s/

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Telephone: (612) 338-2714

ATTORNEYS FOR JOHNSON BROS. WHOLESALE LIQUOR CO., EMPLOYER

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:

JOHNSON BROS.
WHOLESALE LIQUOR CO., INC.,

Employer, **EMPLOYER'S REQUEST FOR REVIEW**

TEAMSTERS LOCAL 503, IBT,

Petitioner,

AND

TEAMSTERS LOCAL 792, IBT,

Intervenor. Case 18-RC-15911

Dated: May 2, 1996

LAW OFFICES OF MARTIN L. GARDEN

By: /s/

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ATTORNEYS FOR JOHNSON BROS.
WHOLESALE LIQUOR CO., EMPLOYER

1. INTRODUCTION

Johnson Bros. Wholesale Liquor Co., (the "Employer") hereby requests the National Labor Relations Board to review the Decision and Direction of Election ("the Decision") which was issued in this matter on April 19, 1996. The Employer's request is based upon the following grounds:

_ 1. The Decision raises substantial questions of law and policy by its departure from Board precedent;

2. The Decision is based upon substantial factual errors which are clearly erroneous and prejudicial to the rights of the Employer;

3. The Decision is based upon a hearing which included prejudicial errors of conduct and rulings.

II. PROCEDURAL BACKGROUND

The Employer is in the wholesale liquor distribution business and maintains an office and warehouse in St. Paul, Minnesota (Tr. 7 and 15).[1] The Employer currently employs approximately 99 full time and part time employees in its warehousing, driving, shipping and receiving operations, other than guards and supervisors. (Er. Exh. 6).[2] The Petitioner, Teamsters Local 503, is a "labor organization" within the meaning of the National Labor Relations Act and currently does not represent any of the Employer's employees.

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[1] References to the official hearing transcript in this matter will be as follows: "Tr. [page no.]."

[2] References to hearing exhibits will be as follows: "Er." is the Employer; "Petr." is the Petitioner; "Int." is the Intervenor, and "Bd." is the Board.

(Tr. 8-9). The Intervenor, Teamsters Local 792, is a "labor organization" within the meaning of the National Labor Relations Act. (Tr. 9). Intervenor Local 792 currently is and has been the duly authorized collective bargaining representative for a unit of the Employer's warehouse and driving employees since some time prior to 1979. (Tr. 14, 17 and 29).

On March 6, 1996 Petitioner Local 503 filed a petition seeking to represent a bargaining unit of the Employer's employees described as, "full time and regular part time individual truck owners," and excluding "all other employees. . . ." (Bd. Exh. 1(a)). On March 14, 1996 the Petitioner filed an Amended Petition which seeks to represent a bargaining unit of the Employer's employees described as, "full time and regular part time individual truck owners, and part time, casual and all other unrepresented drivers and warehousemen employed by the Employer at its University Avenue W., St. Paul, MN location." (Bd. Exh. 1(e)).

A hearing was conducted on the issues raised by the Amended Petition on March 26, 1996, at which time Local 792 was granted Intervenor status. The hearing record remained open thereafter until April 8, 1996 at which time the hearing officer received a list of the Employer's employees into the record as Employer's Exhibit 6, after which the record was closed.

The Employer and the Petitioner Local 503 filed timely briefs and the Regional Director issued his Decision on April 19, 1996.

In directing an election, the Regional Director found: (1) that the current bargaining unit represented by Intervenor Local 792 is limited to 22 "seniority list" employees rather than all of the warehouse employees and drivers as argued by the Employer; (2) that this limited unit is not appropriate; (3) that the current contract covering the 22 "seniority list" employees is not a bar to an election even though the contract

will not expire until May 31, 1997; and (4) that an election in an appropriate unit - consisting of all of the Employer's drivers and warehouse employees - with a 3-choice ballot, is warranted.

III. ISSUES REQUIRING REVIEW

A. The Regional Director's Finding That The Current Collective Bargaining Agreement Between The Employer And Intervenor Local 792 Is Not A Bar To An Election Raises Substantial Questions Of Law And Policy, Is A Departure From Officially Reported Board Precedent, Is Based Upon Substantial Factual Errors Which Are Clearly Erroneous, And Each And All Of The Foregoing Have Resulted In Prejudicial Error To The Employer.

B. The Decision Of The Regional Director That The Existing Unit For Bargaining Is Not Appropriate Raises Substantial Questions of Law and Policy, Is A Departure From Officially Reported Board Precedent, Is Based Upon Substantial Factual Errors Which Are Clearly Erroneous, And Each And All Of The Foregoing Have Resulted In Prejudicial Error To The Employer.

IV. FACTS

Only two witnesses testified at the representation hearing. Martin L. Garden testified on behalf of the Employer. Mr. Garden is an attorney who has over thirty years experience in the practice of labor law, including negotiating collective bargaining agreements under the National Labor Relations Act. In this capacity, he has represented the Employer in connection with the negotiations of all of its collective bargaining agreements with Intervenor Local 792 since 1979 including the current contract. (Tr. 12-13).

Ed Wojciak, a business agent with Intervenor Local 792 was called to testify on behalf of Petitioner Local 503. Mr. Wojciak has been involved in the collective bargaining that resulted in the current contract for the period covering June 1, 1994 through May 31, 1997. (Tr. 59).

The collective bargaining unit which has been represented by Intervenor Local 792 since the 1979 collective bargaining negotiations has consisted of "all drivers, all warehousemen, all individuals that had a direct application in the warehousing, driving and distribution function" including "shipping and receiving clerks" and including both full time and part time employees. Mr. Garden testified to this fact without contradiction by any other witness who was present during said negotiations. (Tr. 14). This collective bargaining unit also included all full time individual truck owners, all part time individual truck owners and all part time casual drivers and warehousemen. (Tr. 15). The 1979 negotiations resulted in a written collective bargaining agreement which covered the period June 1, 1979 through May 1, 1982. (Tr. 15-16; Er. Exh. 1).

All of the job classifications which Petitioner Local 503 petitioned to represent in the present case were clearly part of the collective bargaining unit in 1979, were the subject of negotiations between the Employer and Intervenor Local 792, and were the subject of specific contract provisions. (Tr. 16-19; Er. Exh. 1). For example, the "individual truck owners" sought by the petition are expressly covered in §69, page 18 of the contract. Under that provision, even though the parties had negotiated a separate wage scale for all full time and part time truck drivers, warehousemen, and shipping and receiving clerks (Er. Exh. 1, p. 23), the Employer agreed under §69 of the contract to delegate the authority to the union to set the rates of pay, hours of work, overtime differentials and general working conditions of the individual truck owners. In addition, during the 1979 negotiations and under

the resulting contract, the parties did not distinguish between part time and full time employees with respect to rates of pay, overtime, seniority, lay-offs and recall. (Er. Exh. 1, Art. 2, Art. 6, Art. 7, Art. 8, and Sched. Of Wages).

Mr. Garden testified that even though the Employer and Intervenor Local 792 have negotiated some changes in the collective bargaining agreement since the 1979 agreement, the parties have never negotiated a change in the definition of the collective bargaining unit nor have they deleted any job classifications from the collective bargaining unit represented by Intervenor Local 792. This testimony is uncontradicted. Thus, the collective bargaining unit represented by Intervenor Local 792 is the same for the current contract period as it was for the contract negotiated in 1979. (Tr. 20).

As an example, paragraph 18, page 5, of the 1979 Contract (Er. Exh. 1) gives the union the right to negotiate new job classifications on behalf of the collective bargaining unit it represents. That right was continued in the agreement which was negotiated in 1982 for the period from June 1, 1982 through May 30, 1985 (Tr. 22; Er. Exh. 3) and is in the current contract. (Er. Exh. 2). Pursuant to that provision, during the 1982 negotiations, the Union and the Employer negotiated to split the job classifications of drivers and warehousemen into separate job classifications on a full time and part time basis. Thus, there are now classifications of full time drivers and part time drivers as well as full time warehousemen and part time warehousemen referred to in the contract. Under the new job classification designations, the full time drivers and warehousemen would continue to have their wages and benefits set under the Schedule of Wages attached to the contract, Local 792 also delegated to the Employer the authority to set the wages and benefits for the part time drivers and warehousemen. This latter methodology is substantially similar to the continued agreement of the parties to allow the union to set those items for the

independent truck owners. (Tr. 22-24). In addition, in the 1982 agreement the parties also agreed to differentiate between what hours of the day part time and full time employees could work and the number of hours per day that a part time employee would be able to work. (Tr. 24-25).

The current agreement covering the period from June 1, 1994 through May 31, 1997 was negotiated in 1994. Again, Intervenor Local 792 negotiated on behalf of the same collective bargaining unit it had in 1979 and 1982, including all of the job classifications being sought by Petitioner Local 503 under the current petition. (Tr. 19-21). For example, under Section 39, page 14 of the current contract (Er. Exh. 2) the Employer and Intervenor Local 792 specifically agreed there would no longer be a restriction on the number of hours that part time employees could work. Thus, Local 792 negotiated a benefit on behalf of the part time employees that it represented under the contract, which now allows part time employees to work in excess of 30 hours per week. In addition, Local 792 negotiated a provision which is present in the current contract, with respect to part time employees, which removed the former restrictions as to which shifts or hours of the day that part time employees could work. This again, was a negotiated benefit for the part time employees represented by Local 792 in the negotiations. Finally, Local 792 negotiated a "seniority list" requirement that gave additional preferential rights with respect to terminations for cause, lay-offs, and recall for employees on the list and further provided that the number of employees on the seniority list could never fall below 20. (Tr. 25-26; Er. Exh. 2, §39(d)).

At the current time there are approximately 76 full time employees who have preferential assignment rights negotiated by Local 792 under §39(c) of the collective bargaining agreement (99 total employees less 23 part time employees equals 76 full time employees with preferential rights). (Er. Exh. 2, p. 14). These full time employees have rights over

part time employees with respect to job and overtime assignments. In addition, Intervenor Local 792 also negotiated for a minimum of 20 of these 76 full time employees to continue to have their wages established under the Schedule of Wages attached to the contract and to have additional seniority list rights under §39(d) of the contract. Section 39(d) also gives them preferential rights with respect to layoffs and terminations for cause. Currently, there are 22 such seniority list employees. (Er. Exh. 6). Thus, it is clear that Local 792 represented, negotiated and obtained job security rights for all full time drivers and warehouse employees regardless of whether they are on the separate "seniority list" or not and regardless if they are union members or not. Thus, this is not a "members only" contract.

It has been the consistent position and practice of the Employer and Local 792 that when there is one or more vacancies on the current §39(d) seniority list that said positions shall be filled from within the ranks of the other full time/part time non-seniority list employees. (Tr. 28). Even though the contract language sets 20 as the minimum number for the list, the Employer and Local 792 have exceeded that number during the period covered by the contract, and currently have exceeded it. (Er. Exh. 6).

During the hearing, none of the parties nor the hearing officer advocated the position that the collective bargaining unit represented by Local 792 is not "appropriate". In fact, the Employer, the Petitioner and the Intervenor all took the position at the hearing that Local 792 represented an appropriate bargaining unit. Thus, no party nor the hearing officer introduced any evidence into the record directed at the question as to whether the current bargaining unit was appropriate or not, nor did anyone introduce any evidence as to the community of interests shared by or not shared by any particular employees, any particular groups of employees, or any particular job classifications.

V. ARGUMENT

A. The Regional Director's Decision Refusing To Allow The Current Contract As A Bar To The Petition Constitutes A Departure From Board Policy.

In the present case, Local 503's petition purports to seek to represent independent truck owners, part time drivers and warehousemen, as well as full time drivers and warehousemen who are not members of Local 792. Even excluding the 22 Local 792 members who currently are on the "seniority list," all of the classifications sought by Local 503 have been represented in collective bargaining leading up to the current contract and receive substantial bargained for benefits and terms and conditions of employment in the current contract. The independent truck owners are expressly referred to in §70 and have their rates of pay and terms and conditions of employment established by delegation to Local 792. The part time drivers and warehousemen are expressly provided for under §39(c) whereby Local 792 negotiated on their behalf that there be no restrictions on the number of hours in which they may work and no limitation on the shifts or hours of the day in which they can work. Similarly, the full time drivers and warehousemen are expressly provided for in §39(c) of the current agreement in that they are to be given first choice over part time employees regarding shifts, overtime, etc. As explained in the testimony of Mr. Garden, Local 792, negotiated a delegation to the Employer of the right to set wage and benefit levels for such part time and full time employees who are not covered by the listed on the "Schedule of Wages." Similarly, Local 792 negotiated to provide for wage and benefit levels for the §39(d) "seniority list" drivers and warehousemen to be established by the

reference to the Schedule of Wages. (Page 32 of the contract).

Since all said full time and part time drivers and warehousemen are part of the current collective bargaining unit and are provided for under the express language of the current collective bargaining agreement in one way or another, the contract bar doctrine prohibits any election petition to be filed or acted upon until the next "window period" of approximately March, 1997. (The current contract is scheduled to expire on May 31, 1997).

The Board's long-standing "contract-bar" doctrine is intended to strike a balance between the twin objectives of stable labor relations and affording employees freedom of choice in selecting bargaining representatives. Thus, the Board has consistently held that a current contract of reasonable duration (three years or less) will bar an election petition filed by a non-incumbent union during the duration of the contract. *General Cable Corp.*, 139 NLRB 1123 (1962). In order to protect the valuable goal of employee freedom of choice, however, the Board has established that an election petition is not barred if filed within an existing contract's 30-day "open period" - a period between 90 and 60 days prior to contract expiration. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

In the present case, the existing three year contract is not due to expire until May 31, 1997. Thus, under the Board's contract bar doctrine the petition in the present case would not be timely unless filed approximately in March, 1997.

The appropriateness of the Board's contract bar doctrine has been upheld because otherwise, "Endless petitions for representation elections could hopelessly confuse the labor management relationship." *NLRB v. Bob's Big Boy Family Restaurants*, 693 F.2d 904, 111 LRRM 3132 (9th Cir. 1984). It is clear that the labor-management relationship involving the Employer and Intervenor Local 792 has been extremely

stable. The parties have negotiated numerous contracts without major disruptions for at least two decades during which there was only one strike. During this time period, Local 792 has negotiated on behalf of and obtained benefits for the part time and full time drivers and warehousemen who are not currently on the §39(d) seniority list as well as for employees who are. Whether the terms and conditions of employment and benefits they obtained are better or worse than those they obtained on behalf of other job classifications, or whether they would have been different had another union been negotiating, are not relevant considerations for the Board in this or any proceeding. Unions often negotiate for different levels of benefits and working conditions for different job classifications within the same collective bargaining agreement. Such differences are not destructive to the application of the contract bar doctrine. For it is the ability to negotiate with some flexibility that leads to solutions and to stable labor-management relationships.

The Regional Director's Decision ignores this established Board policy and is based upon erroneous findings of fact and conclusions related to the benefits received by the part time employees and other full time employees who are not on the seniority list. These benefits were negotiated on their behalf by Intervenor Local 792 just as the benefits received by the seniority list employees were. On the one hand, the Decision specifically finds that, "At various times since 1991, the Intervenor has attempted to bargain on behalf of all drivers and warehouse employees." (Decision at 5).[3] The Decision also found that:

> The Intervenor has taken the position since 1991 that all driver and warehouse employees, without regard

[3] References to the Regional Director's Decision and Direction for Election will be as follows: "Decision at [page no.]."

> to full or part time, should be included in the seniority list, the bargaining unit and coverage by the terms and conditions set forth in the collective bargaining agreements between it and the Employer.

(Decision at 7). Moreover, the Regional Director also found that, "...the unit sought by Petitioner consists of a group employees who are in all meaningful respects indistinguishable from those employees included in the Intervenor's unit." (Decision at 9). Finally, the Regional Director makes the erroneous finding that the Employer and Local 792 made an "arbitrary" agreement to "carve out a specific number of positions to be awarded the benefits and protections of a collective bargaining agreement . . ." (Decision at 9-10). This is erroneous for several reasons. First of all, it ignores the evidence of record and the other findings of the Regional Director that the contract provided for some benefits to the part time employees and the full time employees who were not on the seniority list even though they were not as extensive as those benefits of seniority list employees. There is no requirement under the Act that all employees covered by a collective bargaining agreement have exactly the same benefits or have benefits of equal value. Second, the Board's use of the word "arbitrary" is erroneous. The parties had valid reasons based upon their collective bargaining goals, the economics of the particular business and employment market involved, and the perceived political strength within the unit as to support for various bargaining alternatives to arrive at the agreement they did. The fact that the Regional Director may have desired for them negotiate for a different level or mix of benefits is not relevant and does not give the Regional Director the right to declare the agreed upon level and mix as arbitrary or without any value whatsoever to the employees receiving them.

Nor does it make any difference that currently some of the part time or full time employees who are not on the §39(d) seniority list may desire to seek representation by another union rather than the one who negotiated and obtained their current contract benefits. The Board's contract bar doctrine will give them the opportunity to test that desire at an appropriate time. Premature allegations of changed desires of bargaining unit members and premature allegations of schisms between competing unions, do not allow a new petition to test the majority status of the current collective bargaining under the contract bar doctrine. They must wait for the next "window period." *Jet-Pak Corp.*, 231 NLRB 552, 96 LRRM 1112 (1977) and *Allied Chemical Corp.*, 196 NLRB 483, 80 LRRM 1026 (1972).

Moreover, the mere fact that Local 792 now states that they do not represent the job classifications in question, is disingenuous and should have been disregarded by the Regional Director. The testifying Local 792 business agent admitted that he has attempted to bargain on behalf said job classifications during both the 1991 and 1994 contract negotiations. Furthermore, he admitted that over a year ago he attempted to negotiate to move additional part time and full time drivers and warehousemen to the §39(d) seniority list. When the Employer's response at the time was that it would not do so based upon the contract bar defense, Local 792 did not dispute this legal position. In addition, Local 792 did not make any attempt a year ago, or any time during the last several contract periods to obtain authorization cards or otherwise petition for an election. Since they knew and acquiesced in the legitimacy of the contract bar, they may not be rewarded for colluding with Petitioner Local 503 to obtain a premature election. This collusion between the two unions to get around the contract bar doctrine is evident from the record and was ignored by the Decision of the Regional Director. Witness Garden testified that after the filing of the

petition, he had a face-to-face meeting with representatives of Local 792. At this meeting he testified he told them:

> **THE WITNESS:** - I said I didn't understand why Teamsters 503 had filed a petition. I said the only reason they filed was that you people [Local 792] actually believe there is a contract bar and that the only way that you thought you could handle this was to have your sister union petitioning essentially for the same employees you represented. I said to the union representative, I said I have been in this business over 30 years, and I have never seen a situation where two Teamsters locals would be representing the same group of employees. They did not comment on that. Then I said to them, I said in my - it was my opinion that Teamsters Local 503 was like a stalking horse. That if the union was permitted to have an election, that if the union won the election, they would merely turn over the employees to Teamsters Local 792, because again I have never experienced two unions representing essentially the same group of employees at the bargaining table. I mean at a company. It was bizarre.
>
> **HEARING OFFICER BORNONG:** - Well, did they answer that comment?
>
> **THE WITNESS:** - No, they did not. Excuse me, they did. They indicated that that was okay with them, that's correct. Essentially those were the words.

(Tr. 53-54, emphasis added). Both union representatives who were involved in that discussion with Mr. Garden were in the

hearing room. Neither took the stand and refuted this evidence of their collusion. The Decision totally ignored this evidence. It would be a clear departure from established Board policy to allow unions to collude to avoid the application of the contract bar doctrine. *Mack Trucks, Inc.*, 209 NLRB 1003 (1974). For the past 20 years, Intervenor Local 792 has taken the position that it represents all of the driving and warehouse employees of the Employer including full time and part time employees. To then disclaim to represent a portion of those employees in collusion with petitioning Local 503 as a part of an agreement whereby Local 503 will turn over the members to Local 792 in the event the election is successful cannot be condoned under Board policy

For the foregoing reasons, the Board should review the Regional Director's Decision with respect to the contract bar issue and to reverse it upon review.

B. The Appropriate Unit for Bargaining Issue.

The Regional Director's Decision found *sua sponte* that the current unit for bargaining under the existing contract is not an appropriate unit. He did so despite the fact that none of the three parties had taken the position at the hearing or at any other time, including in post hearing briefs, that the current unit was not appropriate. No evidence was requested or introduced at the hearing directed at this issue and to the extent the current unit was discussed during the hearing all parties indicated it to be a long-standing, rightful unit represented by Local 792.

The Regional Director's Decision appears to be based entirely on his erroneous conclusion that: "The arbitrary decision to carve out a specific number of positions to be awarded the benefits and protections of a collective bargaining agreement does not create a group of employees distinct from those sought by the Petitioner." (Decision at

9-10). As demonstrated in the previous argument, this finding and conclusion is erroneous, ignores contrary evidence in the record and is contrary to established Board policy.

Again, it is up to the parties to determine the level and mix of benefits to be distributed to different job classifications in the collective bargaining agreement. In reaching his erroneous conclusion, the Regional Director not only improperly places no value on the bargained for benefits of the part time employees and full time employees who are not on the seniority list, he also makes an erroneous conclusion about the existence of the number of job classifications involved. This is clear from his stated conclusion that, "Both represented employees and unrepresented employees work in the same two job classifications - drivers and warehousemen - during the same the hours and at the same employer facility." (Decision at 9, emphasis added). It is clear from the record, however, that there are more than two job classifications. There are full time warehousemen, there are part time warehousemen, there are full time drivers, and there are potentially future part time drivers covered by the contract. The hearing process elicited no evidence directed at the community of interests which are or are not shared by these four different job classifications. At a minimum, therefore, before the Regional Director can rationally determine that he has an evidentiary basis to rule as he did, he should have reopened the record and taken actual evidence on this issue. Not to do so would be a clear departure from Board policy and Board rules.

Section 11228 of the Board's Case Handling Manual discusses the nature of relevant and admissible evidence peculiar to a representation hearing. That rule specifically states:

> Any party may introduce evidence as to the *scope* (i.e., employee, plant, craft, department) of the unit

sought by the petitioner and its *composition* (i.e., inclusion or exclusion of specific job classifications).

(¶11228, emphasis added). The rule also notes that evidence with respect to the appropriateness of any substantially different bargaining unit will not be received at the hearing unless certain prerequisites are met. Since none of the parties had notice that the hearing was going to determine a substantially different bargaining unit than that sought by Petitioner, the parties were not prepared for and did not put any evidence in the record regarding that issue. Until that is done, the Board is not in a position to rationally determine that the current unit is not appropriate. Making a premature decision on this issue clearly is prejudicial to the rights of the Employer.

For example, in the present case there is no evidence in the record regarding the specific differences or similarities in the following community of interest criteria: (1) methods of wages or compensation payment (salaried or hourly); (2) scheduled hours of work; (3) amount and type of fringe benefits; (4) separate or similar supervision; (5) degree of dissimilar qualifications, training and skills; (6) job functions and amount of working time spent away from the plant sites; (7) infrequency or lack of contact with other employees; and (8) lack of integration with the work functions of other employees or interchange with them. These are well established factors of consideration regarding community of interest issues established by Board precedent. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

VI. CONCLUSION

Based on the foregoing reasons, the Employer respectfully requests that the Board grant its Request for Review of the Decision in the above-entitled matter.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

JOHNSON BROTHERS WHOLESALE LIQUOR COMPANY[1] Employer and TEAMSTERS LOCAL 503 Petitioner	Case 18-RC-15911

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

[1] The name of the Employer appears as amended at hearing.

3. The Petitioner and Teamsters Local 792[3] are labor organizations and claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks an election in a unit consisting of about 75 driver and warehouse employees who it contends are not currently represented by the Intervenor or covered by Intervenor's contract with the Employer. In effect, Petitioner is seeking a residual unit of all unrepresented drivers and warehouse employees. The Employer contends that its contract with the Intervenor covers not only the 22 drivers and warehouse "seniority list employees," but also its 75 other drivers and warehouse employees; and that this contract, therefore, constitutes a bar to the processing of the petition herein. The Intervenor (and the Petitioner) contend that the Intervenor represents only the 22 "seniority list employees"; that its contract with the Employer covers only those 22 employees; and that, therefore, an election in the unit sought by the Petitioner, limited to the remaining employees, is not barred by the contract.

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[2] The Employer, Johnson Brothers Wholesale Liquor Company, is a corporation of an unidentified state with an office and place of business located in St. Paul, Minnesota, where it is engaged in the wholesale sale and distribution of liquor products. During the past 12 months, a representative period, the Employer has purchased and received at its St. Paul, Minnesota facility goods valued in excess of $50,000 directly from sellers located outside the State of Minnesota, and has sold and shipped goods valued in excess of $50,000 from its St. Paul, Minnesota facility directly to customers located outside the State of Minnesota. The Employer receives annual gross revenues in excess of $500,000.

[3] The motion of Teamsters Local 792 to intervene in these proceedings was granted without objection.

For the reasons detailed below, I find that the current unit represented by the Intervenor is limited to the 22 "seniority list employees"; that this unit is not appropriate; that the contract covering those 22 "seniority list employees" is, therefore, not a bar to an election; and that an election in the appropriate unit, consisting of all of the Employer's drivers and warehouse employees, with a three-choice ballot, is warranted.

FACTS

The Employer operates a facility in St. Paul, Minnesota, where it is engaged in the wholesale distribution of liquor products. Lynn Johnson serves as the Employer's president. Currently, the Employer employs about 22 employees as drivers and approximately 75 employees as warehousemen. Of the 22 drivers currently employed, all work full time and 5 are "seniority list employees." Of the 67 warehouse employees, 52 work full time and 15 are "seniority list employees." Twenty-three warehouse employees are considered part time and work a minimum of 4 hours per week. The Employer defines full-time hours as more than 30 hours per week. Since prior to 1979, the Intervenor has represented a unit of employees which has included, at various times, certain drivers, shipping and receiving clerks, and warehousemen at the Employer's St. Paul facility. The current collective bargaining agreement, effective June 1, 1994 through May 31, 1997, provides specific benefits limited to those employees of the Employer who are included in a seniority list ("seniority list employees"). The Employer includes two additional employees (presently on workers' compensation leave) on the seniority list, for a total of 22 "seniority list employees."

The three contracts received into evidence document the development of the current bargaining unit. The terms of the

1979-1982 collective bargaining agreement covered all drivers and warehouse employees, and did not differentiate between full-time and part-time employees. Contract terms were first limited to full-time employees in the 1982-1985 collective bargaining agreement, and language was added excluding "nonunion part-timers, extras [and] temporaries." The most recent contract, effective 1994 through May 1997, retained the 1982 language limiting coverage to full-time drivers and warehouse employees, and expanded the definition of the excluded "nonunion part-timers, extras and temporaries" to add virtually all employees not included on the seniority list.

The collective bargaining agreement, effective from June 1, 1979 through May 31, 1982, applied to "all drivers, warehousemen, shipping and receiving clerks ....specifically set forth on the Schedule of Wages." The Schedule of Wages includes wage rates for drivers, shipping and receiving clerks and warehousemen, as well as pay rates for student workers.

The succeeding collective bargaining agreement between the Intervenor and the Employer, effective June 1, 1982 through May 31, 1985, contains, as indicated by italics, additional language under §3 Coverage:

> For the purpose of this Agreement, the term "employee" shall cover all full-time drivers, warehousemen, shipping and receiving clerks....as specifically set forth on the Schedule of Wages.... *Nonunion part-timers, extras or temporary employees, as defined by Article 8, Section 39, are not covered by this Agreement.*

The 1982-1985 contract adds a new section, Article 8, Section 39, which defines "nonunion, part-timers and temporary employees" as employees who work less than 30 hours per week, except in emergency situations, and who work only

between 3:30 p.m. and 7:00 a.m. Section 39 also contains language providing that no "regular full-time employee union member" will be laid off as a result of the Employer's use of extras, temporaries or part-time employees. Section 39(b) provides that "full-time regular employee-union members" will be given preference over "nonunion extra, temporary or part-time employees for overtime." Section 39(e) required the Employer fill full-time position openings with full-time employees ("seniority list employees"). The Employer testified that the Employer and Intervenor agreed to exclude part-time drivers and warehousemen from the wage schedule in this contract, thereby limiting the contract terms to regular full-time drivers and warehouse employees.

In the current collective bargaining agreement, effective June 1994 through May 1997, the Coverage language remains as it first appeared in the 1982-1985 contract, limiting contract terms to "full-time" employees and expressly excluding "nonunion part-timers, extras [and] temporary employees, as defined by Article 8, Section 39...." Article 8, Section 39, Use of Non-Union Part-Timers, Extras and Temporary Employees, has been modified to eliminate all limitations on the Employer's use of these employees. Section 39(c) of the contract provides that there are to be "no restrictions on the hours in which part-time employees may be used and there will be no limitation on the use of part-time employees, provided ...that the full-time employees will be given first choice as ...[to] shifts, jobs, overtime and/or any other discretionary terms of employment, prior to offers being made to part-time employees." Article 8, Section 39, retains the language prohibiting "regular full-time employee union member[s]" from being laid off as a result of the Employer's use of "extras, temporaries or part-time employees" and language providing overtime preferences to "full-time regular employee-union members." In addition to language removing all limitations on the Employer's use of "part-timers, extras

and temporary employees," Section 39(d) allows the Employer to choose not to replace "seniority list employees" from the seniority list who retire, quit or who are terminated for cause, as long as the Employer maintains a minimum of 20 employees on the seniority list. The Intervenor testified that the Employer exercises total discretion in determining which employees will replace departing "seniority list employees" and that the Employer has maintained 22 "seniority list employees."

The current contract, which expressly excludes "nonunion part-timers, extras or temporary employees," in effect limits the contract terms to "seniority list employees." Attorney Martin Garden, the Employer's sole witness, testified that the Employer currently employs a number of drivers and warehouse employees, who work both full and part time, but who are not "seniority list employees." Garden was unable to testify as to the wages and benefits received by those employees, or to state whether the contractual grievance procedures are available to them.

At various times since 1991, the Intervenor has attempted to bargain on behalf of all drivers and warehouse employees. Garden stated that, in 1991, the Intervenor attempted to increase the number of seniority list positions. He further testified that when the Intervenor recently proposed expanding the unit to include more part-time employees, the Employer refused, declining during the term of the contract to the "broadening of the bargaining unit." According to Garden, the Intervenor wanted to "represent all of the people who were not on the seniority list," taking the position that the non-union employees had a right to representation. The Employer declined the Intervenor's proposal, claiming they already represented all of the employees and that a contract bar existed. Garden suggested to the Intervenor that the parties should discuss the issue in 199'. When Garden, on behalf of the Employer, did offer to add six positions of the

Employer's choice to the "Teamster's seniority list" in order "to give them coverage under the collective bargaining wage and benefits schedule," the Intervenor refused because, according to Garden, they wanted all of the employees sought by the Petitioner added to its bargaining unit. It is the Employer's position that the Intervenor represents and bargains on behalf of all employees involved in the warehouse, distribution and driving operations of the Employer, without distinction between full and part time, but that the Intervenor, in the 1994-1997 collective bargaining agreement, delegated to the Employer the right to set all terms and conditions for all employees excluded from the seniority list.

The Employer asserts that the contract language regarding the use of part-time, extra and temporary employees proves the Intervenor bargained on behalf of those employees. Garden states that in 1982 the Intervenor was concerned about the use of part-timers, and, therefore, the Employer agreed at that time to limit their use of part-timers to work performed after 3:30 p.m. and to assign part-timers less than 30 hours of work per week. The Intervenor appears to take the position that, in 1982, language excluding and defining "part-timers, extras and temporary employees" was negotiated, not as a benefit to those excluded employees, but as a benefit to the Employer, and that the language limiting the use of those employees was the Employer's response to the Intervenor's concern about protecting bargaining unit work. According to Garden, the Intervenor agreed, in 1994, to remove all limitations on the Employer's use of part-timers only after the Employer agreed not to lay off any "seniority list employees" (referred to in the contract as "full-time regular employee Union members") as a result of the Employer's use of part-time employees. In agreeing to remove all limitations on the Employer's use of "part-timers," Garden asserts that the Intervenor was acting out of its fear of the Employer's

operation going totally non-union. The Intervenor's position seems to be that references to "part-timers" in the contract were intended as benefits to the Employer--not benefits bargained on behalf of the employees excluded from the seniority list.

The Employer argues in its post-hearing brief that the language excluding "part-timers, extras and temporary employees" did not actually exclude them from all terms of the contract. At hearing, Employer witness Garden testified that the Intervenor "represented the people, but the Union negotiated to exclude [them] ... from being treated the same as the other seniority people."

The Employer argues that having two unions representing two groups of employees doing the same jobs and working the same hours for the same Employer would create instability. In its brief, the Employer states that allowing an election in the unit sought by the Petitioner could result in "a bizarre destabilizing tripartite relationship" in which there would exist the potential for two unions each claiming to represent the same newly-hired full-time driver or warehouse employees.

The Intervenor has taken the position since 1991 that all driver and warehouse employees, without regard to full or part time, should be included in the seniority list, the bargaining unit and coverage by the terms and conditions set forth in the collective bargaining agreements between it and the Employer.

CONCLUSION

As a threshold matter, I find that the record conclusively establishes that the non-seniority list drivers and warehouse employees are not included in, or part of, the bargaining unit currently represented by the Intervenor. In reaching this conclusion, I rely particularly, as detailed above, on the clear

language of the current collective bargaining agreement between the Employer and Intervenor and their past practice and history of bargaining. In this regard, although the contracts have consistently excluded "nonunion part-timers, . . ." the parties' practice has been to apply that exclusion also to "full-timers" who are not "seniority list employees." Moreover, the evidence established by the Intervenor, including the Intervenor's efforts over the years to add the non-"seniority list employees" to its bargaining unit and the Employer's consistent refusal to do so, clearly supports this conclusion. Indeed, the Employer Attorney Garden's own testimony, as detailed above, strongly suggests that the non-"seniority list employees" have not been included in the unit. The Employer's contention that the contract's mere reference to the circumstances relating to permitting the non-"seniority list" employees to work establishes their inclusion is lacking in merit. These references in the contract to these excluded employees was to protect unit work of "seniority list employees," and not to establish working conditions for these excluded employees. Finally, the Employer contends that the absence in the contract of any provisions relating to wages or working conditions of non-"seniority list employees" is not an indication of their exclusion, but rather an indication that the Intervenor has delegated to the Employer the right to unilaterally establish those conditions. This contention is contrary to the great weight of the evidence and is, therefore, rejected.

In these circumstances, I conclude that the unit currently represented by the Intervenor is based on an arbitrary, artificial grouping of employees and is, therefore, not an appropriate unit. Glosser Bros., Inc., 93 NLRB 1343, 1345 (1951); Stanolind Oil and Gas Research Station, 81 NLRB 1089 (1949). The included employees are identifiable only by their names. No criteria could be identified that distinguishes the represented group from the larger group of employees.

Both represented employees and unrepresented employees work in the same two job classifications--drivers and warehousemen--during the same hours and at the same Employer facility. While all represented unit employees are full-time employees, all unrepresented drivers, as well as most unrepresented warehouse employees, also work on a full-time basis. No appropriate criteria determines which employees are selected as being entitled to the benefits and protections of the current contract between the Employer and the Intervenor since the Employer exercises total discretion in deciding which of its unrepresented employees will fill vacant seniority positions.

Having found that the collective bargaining agreement currently in effect covers a unit found herein not to be appropriate, I conclude that the current contract may not serve as a bar to an election in a unit of the Employer's drivers and warehouse employees. Moveable Partitions, 175 NLRB 915, 916 (1969). Additional support for concluding that the current collective bargaining agreement does not create a bar to an election is evidence that the terms of the current contract provide benefits only to union members and, therefore, cannot operate to bar an election in an appropriate unit. Appalachian Shale Products, 121 NLRB 1160, 1164 (1958).

In these circumstances, there is no reasonable basis upon which to direct an election in the unit sought by the Petitioner. Based on many of the same facts cited above, the unit sought by Petitioner consists of a group of employees who are in all meaningful respects indistinguishable from those employees included in the Intervenor's unit. The arbitrary decision to carve out a specific number of positions to be awarded the benefits and protections of a collective bargaining agreement does not create a group of employees distinct from those sought by the Petitioner. As noted above, the employees sought by the Petitioner perform the same jobs in the same location, presumably for the same supervision, and at the

same times as employees currently represented by the Intervenor.[4]

Accordingly, I find that the evidence fails to establish that the contract between the Employer and Intervenor constitutes a bar, and I shall direct an election in the appropriate unit consisting of all full-time and regular part-time drivers and warehouse employees.[5]

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time driver and warehouse employees employed by the Employer at

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[4] If there existed any reasonable basis upon which to distinguish those sought by the Petitioner from those included in the Intervenor's unit, the unit sought could have been determined to be an appropriate residual unit, and a three-choice election would have been appropriate: (1) representation as a residual unit by Local 503; (2) representation as part of the existing unit by the Intervenor, or (3) no representation. Bradley Transportation Line, Etc., 137 NLRB 1372, 1373 (1962); Southwestern Greyhound Lines, Inc., 112 NLRB 1014, 1017 (1955). However, where, as here, there is no basis to distinguish those drivers and warehouse employees included in a unit from those excluded, an election in the unit sought by the Petitioner could result in two separate unions representing two separate indistinguishable groups of employees--a situation that, as the Employer notes in its brief, would cause "a bizarre destabilizing tripartite relationship."

[5] Although the unit found appropriate herein is broader than that initially sought by the Petitioner, I shall direct an election because the Petitioner has a showing in the broader unit sufficient to warrant an election. N. Summergrade & Sons, 121 NLRB 667. As I have directed an election in a unit larger than that sought by the Petitioner, the Petitioner is permitted to withdraw its petition without prejudice upon written notice to me within 10 days from the date of this decision or, if applicable, from the date the Board denies any request for review of the unit scope findings in this decision. Independent Linen Service Company of Mississippi, 122 NLRB 1002, 1005 (1959).

its St. Paul, Minnesota facility; excluding office clerical employees, managers, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION[6]

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[7]

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[6] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 3, 1996.

[7] To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local 503 or by Teamsters Local 792, or by Neither.

Signed at Minneapolis, Minnesota, this 19th day of April, 1996.

/s/

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board

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addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, 316 Federal Courts Building, 110 South Fourth Street, Minneapolis, MN 55401, on or before April 26, 1996. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

FORM NLRB-502

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
AMENDED PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
18-RC-15911	Mar. 14, 1996

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petition alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- [X] RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- [ ] RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- [ ] RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- [ ] UD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- [ ] UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees. (Check one) [ ] is unit not previously certified. [ ] is unit previously certified in Case No. _____
- [ ] AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Telephone and Fax Nos.
Johnson Brothers Wholesale Liquor Co.	Lynn Johnson, owner	(612) 649-5800

3. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code)
2341 University Ave. W., St. Paul, MN 55104

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service
warehouse	liquor

5. Unit involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) | 6a. No. of Employees in Unit:

Included:	Present
Full-time and regular part-time individual truck owners, and part-time, casual, and all other unrepresented drivers and warehousemen employed by the Employer at its University Avenue West, St. Paul, MN location.	45
Excluded: office clerical employees, guards and supervisors as defined in the Act.	Proposed (By UC/AC)

6b. Is this petition supported by 30% or more of the employees in the unit? YES (Not applicable in RM, UC and AC)

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [ ] Request for recognition as Bargaining Representative was made on (Date) and Employer declined recognition on or about (Date). If no reply received, so state)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of recognized or Certified Bargaining Agent (If none, so state)	Affiliation
	IBT
Address and Telephone Number	Date of Recognition or Certification

9. Expiration Date of Current Contract, if any (Month, Day, Year)	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day, and Year)
11a. Is there now a strike or picketing at the Employer's establishment(s) involved? NO	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) Since (Month, Day, Year)

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Affiliation	Address	Date of Claim (Required only if Petition is filed by Employer)
Teamsters Local 792	IBT	3001 University Avenue, SE Minneapolis, MN 55414	

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name of Petitioner and Affiliation, if any Teamsters Local 503, 1721 Carroll Avenue, St. Paul Minnesota 55104

By _____

Signature of Representative or person filing petition Donald J. Gerdesmeier Title President

Address 1721 Carroll Avenue, St. Paul, Minnesota 55104 Telephone and Fax Nos. (612) 645-0669

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18,

BEST AVAILABLE COPY